IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-782

GATEWAY COAL COMPANY, *Petitioner,*

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT NO. 4,
UNITED MINE WORKERS OF AMERICA; LOCAL NO. 6330,
UNITED MINE WORKERS OF AMERICA, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The Bituminous Coal Operators' Association, Inc., herein called BCOA, respectfully files this brief *Amicus Curiae* pursuant to leave granted by Order of the Court dated February 26, 1973.

INTEREST OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.

The Bituminous Coal Operators' Association, Inc. is a voluntary nonprofit association of bituminous coal mine operators. It was born in 1950 out of an effort to bring a degree of stability out of the labor-management relations turmoil that had long characterized the coal industry. Since that time, BCOA has continued to exist for the purpose of negotiating periodic labor agreements with the United Mine Workers and aiding BCOA members in interpreting these agreements and devising and strengthening mechanisms for bringing about industrial peace in the coal industry. BCOA is also the chief coal industry spokesman on matters involving health and safety.

The members of BCOA are located throughout all the coal mining areas encompassing all of the coal-producing states and collectively produce at least 65 percent of the bituminous coal produced in the United States.

Petitioner Gateway Coal Company is a member of BCOA and a signatory to the National Bituminous Coal Wage Agreement. The employees at the mine are members of a local union of the United Mine Workers of America.

BCOA, therefore, has a continuing interest in preserving and strengthening the contractual procedures for resolving grievances and disputes and in bringing industrial peace to the coal fields.

The decision of the court below, if permitted to stand, will drastically weaken the efficacy of the contractual grievance-arbitration procedures and will ad-

versely affect the ability of the coal industry to maintain an adequate supply of coal. It impinges directly and disastrously on BCOA's two major concerns—the stability of employment and production under the agreement and the improvement of health and safety.

STATEMENT OF THE CASE

The Central Issue in the Case Is the Arbitrability of Safety Grievances.

This brief is addressed to the central issue in this case—the arbitrability of health and safety disputes.

Reversing the judgment of the District Court, the court below held that safety disputes are *"sui generis"* and not arbitrable even under an agreement containing an exceptionally broad grievance-arbitration provision.

By reason of its central ruling that safety disputes are by their very nature unarbitrable, the court below was led in syllogistic sequence to conclude that unions may strike at will over safety disputes and the courts, as well as arbitrators, are powerless to intervene or to resolve the disputed issues.

BCOA believes that these conclusions are clearly wrong as a matter of law, and that chaos is likely to prevail in the coal industry if this decision is allowed to stand. The coal industry is already plagued with an abnormally high incidence of wildcat strikes and the decision of the court below removes a wide range of local disputes over "safety" from the rule of law and relegates them to open warfare, which can only have the effect of seriously aggravating an already alarming lack of stability of employment and production in the coal industry.

Summary of Facts.

The wildcat strike at the Gateway Mine started, not over a safety issue, but over a claim by the local union for reporting pay under the labor agreement.

The target of the wildcatters soon shifted, however, to a demand that the Company discharge three foremen who had allegedly failed to make certain required log entries concerning a ventilation problem that had developed in the mine. The Company first suspended two of the three foremen and then the third pending an investigation by Pennsylvania State safety authorities.

When the State safety authorities found that the foremen could be returned to work without endangering the safety of the miners, two of them were reinstated and the third retired.

This action triggered another general walkout by the local union, although the two reinstated foremen were both employed on only one of the three regular working shifts, and could not have endangered safety on the other two shifts who also went out on strike.

The District Court Decision.

After attempting unsuccessfully to obtain union agreement for arbitration of the dispute, the Company applied for and obtained a temporary restraining order and, later, a preliminary injunction in the District Court. The District Court ordered the parties to arbitrate the question of whether the presence of the two foremen in the mine created any safety hazard, and enjoined the continuance of the strike. *However,* the District Court further ordered that, since the local union claimed that the presence of the foremen in

the mine created a safety hazard, they should "remain suspended until an impartial umpire has determined whether these men should return to work." *Gateway Coal Co.* v. *UMW*, — F. Supp. —, 80 LRRM 2633, 2634 (W.D. Pa. 1971).

The preliminary injunction was appealed to the Third Circuit Court.

The Arbitrator's Decision.

Meantime, the dispute was arbitrated, and before the appeal was heard and decided, the arbitrator issued his decision and award. He held that the dispute was arbitrable under the agreement, that the presence of the two foremen in the mine did not render it unsafe, and that the suspended foremen should be reinstated without interference by the local union.

The Court of Appeals Decision.

Meanwhile, the union had appealed the preliminary injunction to the Third Circuit Court.

The court below reversed the District Court and dissolved the preliminary injunction.

The court majority below held that the dispute was not arbitrable, and as a consequence *Boys Markets* did not apply and no injunction should have issued. The court reasoned that the labor agreement did not explicitly make "safety" disputes arbitrable, and because safety disputes are unique, should not be construed to encompass them. The majority expressly refused to pass on whether it would hold otherwise "in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitra-

tion . . ." *Gateway Coal Co.* v. *UMW*, 466 F. 2d 1157, 1160, fn. 1.

The court below stated its belief that the employees are the sole judge of the safety of the conditions under which they work:

> "If employees believe the correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be." 466 F. 2d at 1160.

The Dissenting Opinion.

Judge Rosenn dissented. He pointed out that there was a serious question whether the strike was because of a safety issue, since it started over the refusal of the Company to pay the men who went home on April 15.

Judge Rosenn held that the decision of the majority placed in the hands of an employee or group of employees the sole and unreviewable power to label another employee a working hazard and engage in a refusal to work and cause other employees unaffected by the issue to strike. He found that the majority decision ran "directly counter to our national labor policy of promoting labor stability" and opened "new and hazardous avenues in labor relations for unrest and strikes." 466 F. 2d at 1162.

Judge Rosenn further found that the majority had misapprehended § 502 of the Labor-Management Relations Act, stating his opinion that this provision does not oust arbitrators or courts from jurisdiction or prohibit courts from compelling arbitration of a safety

dispute. He pointed out that the District Court had in its order forbidden the foremen to return to work pending arbitration of the dispute. 466 F.2d at 1163. By thus conditioning the injunction, Judge Rosenn said, the national policy favoring arbitration could be carried out without endangering the safety of employees.

The order of the court below, Judge Rosenn pointed out, accomplished nothing. It merely restored the parties to the impasse which confronted them in June 1971, with no apparent means of resolution other than self-help.

The U. S. Steel Decision.

The Third Circuit has since applied its ruling in *Gateway* in another case arising under the 1968 National Bituminous Coal Wage Agreement involving a mine of United States Steel Corporation. In that case, the union struck the mine over an alleged failure of a shift foreman to "show the proper concern for mine safety."

The Third Circuit in a *per curiam* opinion set aside a preliminary injunction issued by the District Court. The three-judge panel interpreted the decision in *Gateway* to hold that the 1968 Agreement did not bar miners from striking over safety disputes, and that "it is the miners themselves who should make the determination as to what constitutes a safety hazard." *U. S. Steel* v. *UMW*, 469 F.2d 729 (3d Cir. 1972).

Significantly, while the *per curiam* opinion in the *U. S. Steel* case was joined in by three judges, Judge Layton indicated his disagreement with the *Gateway* opinion but felt bound by it.

ARGUMENT

A. The Decision of the Court Below Will Encourage Instability and Unrest in the Coal Industry.

BCOA is deeply concerned that the decision of the court below will do incalculable harm to labor stability in the coal industry. Nor do we perceive any compensating benefits flowing from the decision to the union or the coal miners.

The decision of the court below carves out all safety disputes or grievances and labels them *"sui generis,"* and *ergo,* nonarbitrable. The court below quite literally held that "safety" grievances are not subject to arbitration and that strikes labeled unilaterally by an employee, a group of employees or a union as "safety" strikes are not enjoinable. The necessary effect of this ruling is to relegate all safety disputes to a no-man's land beyond the reach of arbitrators or courts. This ruling opens the door to self-help, rampant wildcat strikes, and chaos in the coal mining industry.

As dissenting Judge Rosenn so aptly said:

> "If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies, and whims of his fellow employees. Unions, themselves, will be at the mercy of 'wildcatters.' In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes." 466 F.2d at 1162.

The references by Judge Rosenn to "wildcatters," "unrest" and "strikes" is especially apt in the coal in-

dustry. The coal mining industry has the worst record by far of any major industry in frequency of wildcat strikes and production and wages lost due to wildcat strikes.

Incomplete reports received from BCOA members alone show the following losses to the mine operators and the miners due to wildcat strikes over a 4-year period.

Year	Man-Days Lost	Payroll Loss	Tonnage Loss	UMWA Welfare Fund Loss
1969	569,578	$19,164,330	10,897,631	$4,359,052
1970	593,146	21,459,349	11,388,572	4,555,429
1971	565,027	21,981,476	8,762,062	3,739,264
1972	511,177	21,783,128	8,372,091	5,023,250

It is quite literally true that such is the tradition of the union that on numerous occasions all or most of the coal mines in an entire UMWA District, or an entire coal-producing state or group of states, have been shut down by roving pickets over a single grievance at a single mine. This, in fact, happened in this very case. When the wildcat strike occurred at the Gateway mine, roving pickets shut down other mines in the area.

Nearly all of these grievances which lead to wildcat strikes are eventually arbitrated in any event under the agreement.[1] What is needed, therefore, is not the encouragement of greater resort to destructive self-help, but rather greater acceptability by the coal miners and their local unions of the available procedures for the peaceful, expeditious and just arbitration of grievance disputes.

[1] BCOA members alone arbitrated more than 500 grievances in 1972.

The most alarming aspect of the ruling of the court below is that it provides a ready-made excuse for avoiding arbitration and wildcatting over any issue that may arise at the coal mines. As Judge Rosenn so clearly saw, all that an individual or group, pursuing his or their own selfish ends, need do is advance a specious grievance, label it a "safety" issue, mount a wildcat strike, and the dispute would be nonarbitrable and the courts and arbitrators would be powerless to act. It is difficult to see how such a rule could benefit the interests of the union or the miners.

Old habits are hard to break, and the wildcat strike in the coal industry has deep roots in the past. It will take the combined efforts of the employers, the union at all its levels, the employees and the arbitrators and courts to bring about a gradual acceptance by the miners of the amelioratory course of impartial arbitration. *Boys Markets*[2] teaches that, where there exists a contract and machinery for the final and binding resolution of grievances and disputes, a promise is implied on the part of the management, the union, and the employees that they will utilize those procedures rather than resort to self-help, the lockout or the strike. The lower courts have, in numerous decisions, held that *Boys Markets* applies to the National Bituminous Coal Wage Agreement, and certainly there is no industry in which the aid of the courts to encourage recourse to arbitration of disputes is more urgently needed.

The decision of the court below denies arbitration but offers no alternative to arbitration. It repeals the

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[2] *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

Steelworkers Trilogy[3] and *Boys Markets* for safety disputes and unleashes employees and unions and employers to take matters into their own hands, to strike, to lockout and to create economic havoc over any safety issue, real or imagined. But the decision below, as Judge Rosenn so aptly notes, offers no alternative means for the settlement or resolution of the underlying dispute either by arbitration or by court adjudication. This invitation to the law of the jungle in a critical area of labor-management relations—health and safety—is in open and direct contradiction to the national policy, expounded by this Court encouraging resort to impartial arbitration to resolve employee grievances and labor-management disputes.

B. The Decision of the Court Below Conflicts With Fundamental Principles of Labor Law and Policy Established by the Court.

The decision of the court below denying arbitration of "safety" disputes certainly cannot be defended on the ground that it was dictated by decisions of the Court.

The Court has made it clear time after time that nothing is more basic to the national labor policy than the principle of strongly favoring arbitration against stalemate and self-help in resolving labor-management disputes.

The decision of the court below conflicts directly with every facet of that policy, and, in a broad spectrum of disputes—those denominated as safety disputes—literally stands that policy on its head.

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[3] The three decisions on arbitration issued by the Court in 1960. Infra, p. 12.

The Steelworkers Trilogy.

In the three landmark cases decided by the Court in 1960, the Court created a strong presumption favoring arbitration of grievance disputes. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960). In effect, the Court held that where there exists an arbitration provision, all disputes are arbitrable unless specifically excluded from arbitration. As the Court stated in *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960):

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

Nothing could be more plain than that. The Court did not exclude the broad category of safety disputes from this rule.

But here, the court below applied the reverse presumption. The court below fashioned its own rule for safety disputes. The court held that safety disputes are *"sui generis"* and thus not subject to the strong federal policy favoring arbitration of "the ordinary types of labor disputes." Therefore, in order for a safety dispute to be arbitrable, the court reasoned, the agreement must at the very least *explicitly* make safety disputes arbitrable.

The court then examined the exceptionally broad language of the 1968 National Bituminous Coal Wage

Agreement and found that the Agreement provided for arbitration of "local trouble of any kind" at the mine. Nevertheless, the court found that this did not suffice because:

> "It is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration, and the practice of the parties has been to the contrary." 466 F.2d at 1159.

Indeed, the court below hinted very strongly that it would not require arbitration of safety grievances even if the parties expressly so agreed.[4]

Obviously, no argument is needed to demonstrate that the court below has attempted to fashion a new rule for safety disputes which is in direct opposition to rule announced by this Court in the *Steelworkers Trilogy.*

The court below seeks to justify this totally different approach to arbitration by asserting that safety disputes are *"sui generis"* and that employees do not and should not have to submit matters affecting their safety to an arbitrator, no matter how impartial he may be.

But, as Judge Rosenn perceived, the argument is self-defeating. The decision of the court denying arbitration provides no other means for resolving the issues between the parties. Rather, it sanctions the indefinite continuation of a wildcat strike over a safety dispute

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[4] The decision of the court below conflicts broadly with the decision of the Eighth Circuit Court of Appeals in *Hanna Mining Co.* v. *Steelworkers*, 464 F. 2d 565 (8th Cir. 1972). The opinion in the *Hanna* case distinguishes the *Gateway* decision on the facts, but it is clear that the two court decisions are in basic conflict in principle.

but offers no hope of settlement of the dispute except through trial by combat. This is manifestly a sterile doctrine.

We submit that the court below is wrong in its belief that safety disputes do not lend themselves to resolution through arbitration.

Safety Disputes Are Susceptible to the Arbitration Process.

Arbitrators, like courts, are trained and conditioned to adjudicate a wide range of issues, including many that require an ability on the part of the arbitrator to comprehend technical fields such as health and safety. In this very case, the issue of whether the continued presence of two foremen in the mine created a safety hazard was certainly one that an experienced arbitrator could cope with, and the court below offers no cogent argument to the contrary.

In all human relationships, disputes arise which require resolution by judges or arbitrators for the plain and simple reason that where the parties are unable to resolve a dispute between or among themselves, another means of adjudication must be found. That is why we have courts and arbitrators, and we cannot carve out a large area of potential industrial issues, denominate them as "safety disputes" and remove them from the subjects which require third party adjudication. Experience teaches that if an honest difference arises, some means must eventually be found for a peaceful resolution. Here, the parties, through their industry-wide collective bargaining agreement, have chosen to give the broadest scope to arbitration, agreeing to arbitrate any grievance, any dispute, or "any local trouble of any kind." They entered into this procedure voluntarily and should now be obligated

to use it. The decision of the court below denies them that peaceful avenue and leaves them to their own devices.

Safety Disputes Are Being Arbitrated.

The court below was incorrect in its assumption that safety disputes have not been arbitrated under the National Bituminous Coal Wage Agreement. It may be that the local union and management at the Gateway Mine had not previously arbitrated a safety grievance, but the industry practice has been to arbitrate all kinds of disputes and grievances, and this includes, without distinction, safety grievances.

The union argues that the provision in the 1968 Agreement—which provides that the local Mine Safety Committee can declare that an "imminent danger" exists and have the miners withdrawn from allegedly dangerous areas—evidences an intent that safety disputes should not be arbitrated. This is patently a *non sequitur*. Once the Mine Safety Committee has acted and the miners are temporarily withdrawn, there still remains a potential dispute as to the existence of an imminent hazard, and this dispute will normally be resolved either by mutual agreement, or failing agreement, by arbitration.

Moreover, this same provision for a Mine Safety Committee, with the same authority in the Mine Safety Committee to declare that an imminent danger exists, is found in the 1971 Agreement (see Appendix 6a) and yet the 1971 Agreement contains some new and special provisions for arbitrating health and safety disputes.

In sum, on this issue of arbitrability of safety disputes under the successive National Coal Wage Agreements, including the 1968 Agreement, the practice has been to give the widest scope to grievance arbitration,

including arbitration of safety grievances. BCOA receives copies of arbitration awards involving BCOA members and BCOA's arbitration files show that at least forty safety disputes [5] have been arbitrated in the past three years, and we know of no arbitrator who ever rejected a safety dispute as being nonarbitrable.

In the 1971 negotiations, in recognition of the growing concern of the union and industry with health and safety, the negotiators devised and put into the national agreement some specially designed procedures for handling health and safety disputes. But, long before that, these disputes were cognizable under the general grievance-arbitration provisions of the agreement. (The pertinent provisions of the 1968 and 1971 Agreements relating to grievance and arbitration are set forth in the Appendix to this brief.)

C. The Decision of the Court Below Conflicts Directly With the Uniform Interpretation of § 502 of the Labor-Management Relations Act.

To bolster its view that "safety" issues are by their very nature not arbitrable, the court below called upon its own unique interpretation of § 502 of the Labor-Management Relations Act. This Section provides that when employees in good faith quit work because of abnormally dangerous conditions, it shall not be deemed a "strike."

The purpose of this provision in the Act was to protect employees from discharge where they leave work in concert because of abnormally dangerous working conditions. Two elements must coincide before this provision comes into play. First, the concerted

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[5] The usual context in which a safety issue is arbitrated arises out of the refusal of an employee to perform a particular task on safety grounds and consequent disciplinary action taken by management against such employee.

abstention from work must be in good faith, and second, abnormally dangerous conditions must in fact exist. This has been the uniform interpretation of this provision by the National Labor Relations Board and the courts. Thus, the NLRB said in *Redwing Carriers*, 130 NLRB 1208, 1209 (1961), *enf'd. as modified*, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905:

> "It is necessary first to clarify the meaning of the term 'abnormally dangerous conditions' as used in Section 502. We are of the opinion that the term contemplates, and is intended to insure, an objective as opposed to a subjective test. What controls is not the state of mind of the employee or employees concerned, but whether the actual circumstances shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'"[6]

In other words, the test is not a "good faith apprehension of physical danger" but rather by the use of "an objective, as opposed to a subjective, test" to determine whether "the actual working conditions shown to exist might in the circumstances reasonably be considered 'abnormally dangerous.'" The Courts of Appeals have adopted the *Redwing* test in construing § 502. See *NLRB* v. *Fruin-Colnon Construction Co.*, 330 F.2d 885, 892 (8th Cir. 1964); *Philadelphia Marine Trade Association* v. *NLRB*, 330 F.2d 492, 495 (3d Cir. 1964), *cert. denied*, 379 U.S. 833; *NLRB* v. *Knight Morley Corp.*, 251 F.2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927.

The court below chose to give § 502 a wholly different interpretation, leaving it entirely to the subjective

[6] This standard or construction of § 502 was most recently affirmed by the Board in *Anaconda Aluminum Co.*, 197 NLRB No. 51, 80 LRRM 1780 (1972).

judgment of any individual employee or group of employees, or the local union as to whether abnormal hazards exist. This interpretation runs counter to the stream of NLRB and judicial opinion.

In any event, as Judge Rosenn points out, a determination must still be made as to the conditions under which the employees shall return to work, what conditions are safe and what are not, and there is nothing in § 502 to suggest that these safety disputes are not proper subjects for impartial arbitration. As Judge Rosenn stated:

> "Section 502 nowhere states or implies that safety issues are not appropriate for an arbitrator's decision. In fact, as I view it, the section requires a third party, a court, to determine the reasonableness of the union's belief in the abnormally dangerous condition. Since Congress has determined by its enactment of Section 502 that a court may appropriately decide a safety claim, absent language to the contrary, there is no reason to believe that an impartial arbitrator is not equally capable of rendering a similar decision." 466 F.2d at 1162.

CONCLUSION

We think it significant, in assessing the efficacy and fairness of encompassing safety within the area of arbitrability under the *Steelworkers Trilogy,* that no legitimate safety interest of the employees at the Gateway Mine was in any way endangered by the invocation of the *Boys Markets* injunction or by the District Court Order requiring that the dispute be arbitrated. The District Court conditioned the injunction on the continued suspension of the two foremen until the issue of whether their presence in the mine endangered

safety had been determined by the impartial arbitrator. Thus, by this process, the integrity of the arbitration process was upheld, the mine was kept in operation, the safety interests of the employees were protected, and the underlying "safety" issue was resolved by the arbitral process that the parties had, themselves, chosen.

All this was, of course, undone by the Court of Appeals decision.

The decision of the court below licenses wildcat strikes over real or contrived grievances and provides an easy loophole for evading the agreed-upon arbitration procedures. Mine operators faced with wildcat strikes over any issue denominated as a "safety" issue must either capitulate or risk an indefinite shutdown and eventual economic ruin. Miners wishing to arbitrate a safety issue will be foreclosed from that opportunity. Miners who perceive no danger and wish to continue to work will find themselves at the mercy of the wildcatters over any kind of specious health or safety dispute.

We must disagree with the unspoken premise of the court below that safety disputes are so different from all other disputes as not to be susceptible to reasoned impartial adjudication by arbitrators. The type of resolution to which the parties are left by the decision of the court below—by a test of economic strength between mine owner and wildcat strikers—is hardly calculated to provide a better, a more rational, or a more equitable decision or one that will better serve the cause of safety than the reasoned process of arbitration.

BCOA submits that the decision of the court below is a major retrogressive step which, if not reversed,

will create chaos and confusion throughout the coal fields. The proposition of law it expounds is unthinking and dangerous. Its adverse impact on labor relations in the coal fields is immediate and apparent. It does not serve the cause of improved safety, but rather invites recourse to economic warfare on a national scale in the coal industry.

Respectfully submitted,

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